Omega Securities Sdn Bhd v LT Gen (B) Tan Sri Mohamed bin Ngah Said

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1891 OF 2009
LOW HOP BING, SURIYADI AND ALIZATUL KHAIR JJCA
8 AUGUST 2012

Civil Procedure — Appeal — Evidence, evaluation of — Whether trial judge failed to judicially appreciate plaintiff's oral and documentary evidence to hold there was concluded and binding agreement between parties — Whether trial judge uncritically accepted defendant's testimony without judicially appreciating defence of bare denial — Whether trial judge erred in not considering defendant's failure to react to letters of demand and other notices served by plaintiff

The High Court had dismissed the appellant's claim against the respondent for contra losses arising from share trading on a non-margin facility account. It held that because the appellant failed to produce the non-margin facility agreement between the parties but only the Individual Account Application Form ('P1'), which failed to indicate whether the respondent applied for a margin or a non-margin account, and in the absence of evidence that the respondent had in fact given instructions to trade in the shares, the appellant had failed to prove its claim. At the trial the appellant adduced oral evidence of two witnesses, PW1 and PW2, and documentary evidence which included P1, a statement of account of the respondent's indebtedness, an account showing a history of the respondent's transactions, the purchase contract notes, letter of authorisation given to PW2 and letters of demand from the appellant's solicitors and its receivers and managers to the respondent together with the certificates of their posting. In his defence, the respondent, inter alia, alleged he was unaware a facility with the appellant had been opened under his name; he did not receive from the appellant any contract notes for transactions made or any statement of outstanding sum due; and he did not know any remisier named 'DHM'. The appellant appealed to the Court of Appeal against the dismissal of its claim.

Held, allowing the appeal with costs, setting aside the High Court's decision and allowing the appellant's claim:

(1) The trial judge erred in law and in fact in failing to consider and judicially appreciate the oral evidence of PW1 and PW2 and the relevant contemporaneous documentary evidence of the appellant which established on balance of probabilities that there was a concluded and binding contract between the parties and that the respondent was indebted to the appellant as claimed (see para 16).

(2) The trial judge failed to appreciate that clause 1 of P1 actually and clearly provided that the terms and conditions in P1 applied to both margin and non-margin trading accounts. By holding that those terms and conditions applied only to a margin account and not to a non-margin account the trial judge erred in deciding the appellant could not rely on cl 13 in P1 to establish that the statement of account showing the respondent's indebtedness was final and conclusive for the purpose of legal proceedings (see para 21–22).

(3) The trial judge had uncritically accepted the respondent's testimony without properly evaluating and weighing it against his contemporaneous conduct and the contemporaneous documents. More importantly, there was a failure to judicially appreciate that the respondent's testimony was a bare denial which lacked any probative value (see para 18).

(4) Sufficient regard was not given to the fact that the respondent failed to protest to the transactions or usage of his non-margin trading account; that he never protested or queried the appellant upon receiving the contract notes and letters of demand; the legal implication of the respondent's failure to protest or object to the transactions at the material time and/or the fact fraud or forgery was not pleaded by the respondent (see para 19).

(5) The respondent's attempts to raise issues about the margin facility agreement and power of attorney not being dated, stamped or signed before an advocate and solicitor; the uncompleted 'Customer Assessment Form'; and the uncompleted letter of authorisation were irrelevant and immaterial as the appellant's claim was based on the outstanding sum in the non-margin trading account (see para 20).

(6) (per **Suriyadi JCA**, dissenting) The agreement between the parties was not properly executed. P1 did not establish the existence of a non-margin facility agreement. There was no convincing evidence the respondent had applied for the facility (see para 4).

(7) (per **Suriyadi JCA**, dissenting) PW1 testified that the respondent had signed P1 whereupon the shares were bought. Unfortunately the very person who received the instructions for the transactions was not called (see para 2).

(8) (per **Suriyadi JCA**, dissenting) P1 was not dated and stamped and therefore inadmissible in court as evidence per s 52 of the Stamp Act 1949; P1 pertained to a margin agreement whilst the appellant's claim was based on a non-margin account; the power of attorney was not dated or properly executed; the document was not filled up and the authorisation letter did not mention the authorised person who would deal with the account (see para 3).

[Bahasa Malaysia summary

Mahkamah Tinggi telah menolak tuntutan perayu terhadap responden bagi kerugian kontra yang timbul daripada perdagangan saham-saham dalam kemudahan akaun tidak bermargin. Ia memutuskan bahawa oleh kerana perayu gagal mengemukakan perjanjian kemudahan tidak bermargin antara pihak-pihak tetapi hanya borang permohonan akaun individu ('P1'), yang mana gagal untuk menunjukkan sama ada responden memohon untuk akaun margin atau tidak bermargin, dan dalam ketiadaan keterangan bahawa responden telah sebenarnya memberikan arahan untuk berdagang saham-saham tersebut, perayu telah gagal untuk membuktikan tuntutannya. Ketika perbicaraan tersebut, perayu mengemukakan keterangan lisan dua orang saksi, PW1 dan PW2, dan keterangan dokumentar termasuk P1, penyata akaun keterhutangan responden, suatu akaun yang menunjukkan sejarah transaksi-transaksi responden, pembelian nota-nota kontrak, surat kebenaran yang diberikan kepada PW2 dan surat tuntutan daripada peguam perayu dan penerima dan pengurus responden bersama-sama dengan sijil-sijil pengeposan. Dalam pembelaannya, responden, antara lain, mendakwa bahawa dia tidak menyedari kemudahan dengan perayu telah dibuka di bawah namanya; dia tidak menerima sebarang nota-nota kontrak bagi transaksi-transaksi yang dibuat atau apa-apa pernyataan jumlah tertunggak daripada perayu; dan dia tidak mengetahui mana-mana remisier yang dikenali sebagai 'DHM'. Perayu merayu kepada Mahkamah Rayuan terhadap penolakan tuntutannya.

Diputuskan, membenarkan rayuan dengan kos, mengetepikan keputusan Mahkamah Tinggi dan membenarkan tuntutan perayu:

(1) Hakim bicara telah terkhilaf di bawah undang-undang dan fakta dalam kegagalannya untuk mempertimbangkan secara kehakiman keterangan lisan PW1 dan PW2 dan keterangan dokumentari semasa berkenaan perayu yang dibuktikan atas imbangan kebarangkalian bahawa terdapat kontrak yang termeterai dan mengikat antara pihak-pihak dan bahawa responden berhutang kepada perayu seperti yang didakwa (lihat perenggan 16).

(2) Hakim bicara gagal untuk mempertimbangkan bahawa klausa 1 P1 sebenarnya dan dengan jelas memperuntukkan bahawa terma-terma dan syarat-syarat dalam P1 terpakai ke atas kedua-dua margin dan akaun dagangan tidak bermargin. Dengan memutuskan bahawa terma-terma dan syarat-syarat memohon hanya terpakai ke atas akaun margin dan bukan akaun tidak bermargin, hakim bicara telah terkhilaf dalam memutuskan bahawa perayu tidak boleh bergantung pada klausa 13 di P1 untuk menubuhkan bahawa penyata akaun tersebut menunjukkan keterhutangan responden adalah muktamad dan konklusif bagi maksud prosiding undang-undang (lihat perenggan 21–22).

(3) Hakim bicara secara tidak kritis menerima testimoni responden tanpa sebetulnya menilai dan menimbangkan ia terhadap perlakuan dan dokumen semasa. Lebih penting lagi, terdapat kegagalan dalam menimbangkan kehakiman bahawa testimoni responden adalah penafian kosong yang tidak mempunyai apa-apa nilai probatif (lihat perenggan 18).

(4) Pertimbangan secukupnya tidak diberikan kepada fakta bahawa responden gagal untuk memprotes transaksi-transaksi atau penggunaan akaun dagangan tidak bermargin; bahawa dia tidak pernah membantah atau menyoal perayu apabila menerima nota-nota kontrak dan surat-surat tuntutan; implikasi undang-undang terhadap kegagalan responden untuk memprotes atau membantah transaksi-transaksi pada masa material dan/atau fakta penipuan atau pemalsuan tidak diplidkan oleh responden (lihat perenggan 19).

(5) Percubaan-percubaan para responden untuk membangkitkan isu-isu mengenai perjanjian kemudahan margin dan surat kuasa wakil yang tidak bertarikh, dicap atau ditandatangani di hadapan seorang peguam bela dan peguamcara; 'Borang Penilaian Pelanggan' yang tidak lengkap; dan surat kebenaran yang tidak lengkap tidak relevan dan tidak penting kerana tuntutan perayu berdasarkan jumlah tertunggak dalam akaun dagangan tidak bermargin (lihat perenggan 20).

(6) (oleh **Suriyadi HMR**, menentang) Perjanjian antara pihak-pihak tidak dilaksanakan dengan betul. P1 tidak membuktikan kewujudan perjanjian kemudahan tidak bermargin. Tiada bukti yang meyakinkan bahawa responden telah memohon untuk kemudahan tersebut (lihat perenggan 4).

(7) (oleh **Suriyadi HMR**, menentang) PW1 telah memberikan keterangan bahawa responden telah menandatangani P1 sejurus saham dibeli. Malangnya orang yang menerima arahan untuk transaksi-transaksi tidak dipanggil (lihat perenggan 2).

(8) (oleh **Suriyadi HMR**, menentang) P1 tidak bertarikh dan dicap dan dengan itu tidak boleh diterima di mahkamah sebagai bukti di bawah s 52 Akta Setem 1949; P1 berhubung suatu perjanjian margin sedangkan tuntutan perayu adalah berdasarkan pada suatu akaun tidak bermargin; surat kuasa wakil yang tidak bertarikh atau disempurnakan; dokumen yang tidak diisi dan surat kebenaran tidak menyebut orang yang diberi kuasa untuk berurusan dengan akaun (lihat perenggan 3).]

Notes

For cases on evaluation of evidence, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 992–995.

Cases referred to

Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Sen & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Legislation referred to

Evidence Act 1950 s 90A
Stamp Act 1949 (Consolidated and Revised 1989) s 52

Appeal from: Civil Suit No D7–22–909 of 2009 (High Court, Kuala Lumpur)

Bahari Yeow (Lee Hishamuddin Allen & Glenhill) for the appellant.
D Paramalingam (Krish Maniam & Co) for the respondent.

Suriyadi JCA (dissenting):

[1] The facts are as follows. It was alleged that an agreement was executed between the plaintiff and the defendant whereby the plaintiff was to deal with the purchase and sale of shares. The agreement was a non-margin facility. It was agreed that the plaintiff was to sell when required and the defendant to indemnify the plaintiff when the need arises. The plaintiff did comply with the agreement but the defendant failed to indemnify when losses arose. The plaintiff then terminated the agreement. The plaintiff subsequently took up action against the defendant for contra losses of RM33,258,017.27 at the High Court.

[2] During the proceedings PW1 testified that the defendant had signed the individual application form whereupon the shares were bought. Unfortunately, the very person who received the instruction of the transaction was not called. After a full trial the plaintiff lost and filed this appeal.

[3] I dismissed the appeal on the basis that there was no error on the findings of the High Court. I agreed with the High Court's findings that:

(a) the agreement ie P10 was not dated and stamped. Section 52 of the Stamp Act 1949 (Consolidated and Revised 1989) provides that such document is inadmissible in court as evidence;

(b) this agreement pertained to a margin agreement whilst the plaintiff's claim was based on a non-margin account;

(c) the power of attorney was not dated and was not properly executed;

(d) the document was not filled up; and

(e) the authorisation letter did not mention the authorised person who would deal with the account.

[4] For the above reasons, I concluded that the the agreement was not properly executed. P1 did not establish the existence of a non-margin facility agreement. I was not convinced that the defendant had applied for the facility hence my dismissal of the claim.

Alizatul Khair JCA:

[5] This was an appeal by the appellant, ('the plaintiff in the High Court') Omega Securities Sdn Bhd against the decision of the learned High Court judge who had after a full trial dismissed the appellant's claim with costs. We had, by a majority, allowed the appellant's appeal.

[6] The appellant's claim against the respondent was basically for contra losses arising out of the sale and purchase of UCB shares. The brief facts of the case are essentially as follow.

[7] By a written agreement ('the said agreement') between the appellant and the respondent, the respondent had agreed to open a non-margin facility account with the appellant for the purpose of, inter alia, purchasing shares through the respondent. Pursuant to the said agreement, the appellant had carried out purchase of the shares on behalf of the respondent and upon instructions by the respondent. Contract notes for each and every purchase of the shares by the appellant on behalf of the respondent had been forwarded to the respondent.

[8] In breach of the terms of the said agreement, the respondent failed to pay for the shares in accordance with the rules of the Kuala Lumpur stock exchange (now, Bursa Malaysia).

[9] Vide letter dated 17 July 1998, the appellant terminated the said agreement and demanded from the respondent the immediate payment of the sum outstanding. Despite a second letter of demand, the respondent failed to pay the sum due. The appellant then filed the present suit in the High Court Kuala Lumpur.

[10] In their statement of claim, the appellant's claim against the respondent was for the sum of RM33,258,017.27 as at 9 June 1998 together with interest of RM50 and further interest at the rate of 18%pa on the said sum of RM33,258,017.27 from 10 June 1998 until full and final settlement.

[11] At the trial before the High Court, the appellant produced the following evidence in support of their claim:

(a) the oral evidence of their finance manager, Lau Jiong Chean (PW1), and one Lim Jit Cheng (PW2) who gave evidence on behalf of the appellant's liquidator;

(b) the following undisputed contemporaneous documents:

(i) individual account application form signed by the defendant containing the terms and conditions governing the account (ie the said agreement) P1;

(ii) the statement of account showing the indebtedness of the defendant as at 9 June 1998: P2;

(iii) the statement of account showing the report of history transactions of the defendant: P3;

(iv) the certificate of verification pursuant to s 90A of the Evidence Act 1950: P4;

(v) the purchase contract notes (PN073119A and PN073193): P5;

(vi) the certificate of verification pursuant to s 90A of the Evidence Act 1950: P6;

(vii) the letter of authorisation given to PW2: P9;

(viii) the letter of demand issued by the plaintiff's receivers and managers dated 17 July 1998: P10;

(ix) the certificate of posting: P11;

(x) the letter of demand issued by the plaintiff's solicitors dated 16 September 1998: P12; and

(xi) the certificate of posting: P13.

[12] The respondent's defence, on the other hand, rested entirely on his oral evidence. In his testimony before the High Court, the respondent alleged that he was given several blank forms by his old friend, Dato' Soh Chee Wen to sign; that he did not know that there was a facility opened under his name with the appellant; that he had not received the statement of outstanding sum due; neither has he received the contract notes for the transaction of the UCB shares; and that he does not know who 'DHM' is (DHM was the remisier). In short the respondent's defence was a bare denial.

[13] At the conclusion of the trial, the learned trial judge found that the appellant had failed to prove its case on a balance of probabilities and dismissed the appellant's claim with costs.

[14] From her judgment, it would appear that the learned judge's decision was premised, inter alia, on the following grounds:

> Given the fact that there is no non-margin facility agreement produced by the plaintiff, but only the individual account application form of which there is no indication whether the defendant has actually applied for a margin or non-margin

account, and in the absence of any evidence from the plaintiff that the defendant has in fact given instructions to trade in the UCB shares, I find that the plaintiff has not discharged the burden of proof. The plaintiffs claim is accordingly dismissed with costs.

[15] After careful consideration of the appeal, we were constrained to agree with the apellant's counsel that there was insufficient judicial appreciation of the evidence before her when the learned judge arrived at her decision, thus warranting appellate intervention. In *Gon Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Sen & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, the Federal Court held as regards appellate intervention, as follows:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, *the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court.* Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a *decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.* This is consistent with the established plainly wrong test. (Emphasis added.)

[16] We find that the learned judge had erred in law and in fact in failing to consider and to judicially appreciate the relevant contemporaneous documentary evidence as set out in para (2) above which established on balance of probabilities that there was a concluded and binding contract between the appellant and the respondent and that the respondent was indebted to the appellant as claimed.

[17] The learned judge had also in our view failed sufficiently or at all to judicially appreciate the oral evidence adduced by PW1–PW2 which was supported by the abovesaid contemporaneous documents which established that the outstanding sum as claimed by the appellant was due and payable by the respondent.

[18] We also find that in arriving at her finding and conclusion the learned judge had uncritically accepted the testimony of the respondent without properly evaluating and weighing the testimony of the respondent against the respondent's contemporaneous conduct and the contemporaneous

documents. More importantly she failed to appreciate judicially that the respondent's testimony consisted of a bare denial which lacked any probative value.

[19] In finding that there was no evidence from the appellant as to the person who had actually received instructions from the respondent to purchase the shares we find that the learned judge failed to give sufficient regard to the fact that:

(a) the respondent had failed to protest to the transactions or usage of his non-margin trading account; and

(b) the respondent had never protested nor queried the appellant upon receiving the contract notes from the respondent and/or the letters of demand dated 17 July 1998 and 16 September 1998;

(c) the legal implication on the respondent's failure to protest or object to the transactions at the material time; and/or

(d) the fact that fraud or forgery was not pleaded by the respondent.

[20] We also agree with learned counsel for the appellant that the attempt by the respondent's counsel to raise issues on the margin facility agreement and power of the attorney which were not dated, stamped nor signed before an advocate and solicitor; the uncompleted 'customer assessment form'; and the uncompleted letter of authorisation were irrelevant and immaterial in these proceedings as the appellant's claim was based on the outstanding sum in the non-margin trading account.

[21] Finally, we observed that in finding that there was no evidence to indicate whether the respondent had applied for a margin or non-margin facility trading account, the learned trial judge had failed to appreciate that cl 1 of P1 actually and clearly provides that the terms and conditions in the said agreement applied to both margin and non-margin trading account. Clause 1 of P1 reads as follows:

> I/We request you to open a securities trading/margin account ('account') and agree to abide by all laws relating to and/or governing my/our trading activities with you including without limitation the Rules and Regulations of the Kuala Lumpur Stock Exchange (KLSE) or any regulatory body as amended from time to time.

[22] The learned judge therefore erred in holding that the appellant could not rely on cl 13 of the said agreement to establish that the statement of account showing the respondent's indebtedness is final and conclusive for the purpose of legal proceedings on the ground that cl 13 and the other terms and

conditions of the said agreement (referred to by PW1 in his evidence) were not in respect of the terms and conditions for the non-margin account but in respect of a margin account.

[23] For the above reasons, we allowed the appeal, set aside the decision of the High Court and substituted it with an order that the appellant's claim be allowed. We also awarded costs in the sum of RM25,000 and ordered that the deposit be paid to the appellant on account of fixed costs.

Appeal allowed with costs, High Court's decision set aside and appellant's claim allowed.

Reported by Ashok Kumar